

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

**SOUTHWESTERN BELL MOBILE
SYSTEMS LLC**

**Plaintiff, Defendant in
Counterclaim**

v.

CHRISTOPHER P. KUHN,

**Defendant, Plaintiff in
Counterclaim**

Civil Action No.: 04CV11584 PBS

**PLAINTIFF'S MOTION TO DISMISS COUNT III (DEMAND FOR AN ACCOUNTING)
AND COUNT IV (BREACH OF CONTRACT) OF DEFENDANT'S COUNTERCLAIM**

Plaintiff, Southwestern Bell Mobile Systems LLC ("SBMS") hereby moves this Court, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss Defendant's, Christopher P. Kuhn ("Kuhn"), Counterclaim Count III (Demand for an Accounting) and Count IV (Breach of Contract).

As grounds for this motion, SBMS states that:

- (1) There is no contractual provision that applies to Kuhn's Counterclaim Count III that he is entitled to an accounting, and Kuhn does not allege so in his counterclaim; and
- (2) There is no existing and/or controlling authority under Massachusetts common law that would entitled Kuhn to an accounting.

For these reasons, and those more fully set forth in SBMS' Memorandum of Law in Support of this Motion, submitted herewith and incorporated herein by reference, SBMS respectfully request that this Court:

- A. Enter an Order:
- (i) Dismissing Kuhn's Counterclaim Count III for failure to state a claim upon which relief can be granted;
 - (ii) Dismissing Kuhn's Counterclaim Count IV for failure to state a claim upon which relief can be granted;
- B. Enter an award of attorneys fees and costs to SBMS for having to bring this motion; and
- C. Grant such other and further relief as this Court deems just and proper.

LOCAL RULE 7.1 CERTIFICATION

Pursuant to Local Rule 7.1(A)(2), SBMS' counsel hereby certifies that they have attempted, in good faith, to resolve or narrow the issues related to this motion but have been unable to do so.

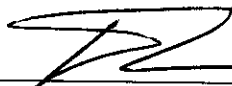
REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(D), SBMS hereby requests oral argument on the present motion.

Respectfully submitted,

Southwestern Bell Mobile Systems LLC,

By their attorneys,

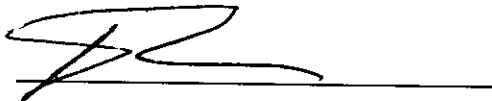


Jonathan Sablone, BBO #632998
Juán A. Concepción, BBO #658908
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110-2131
(617) 345-1000

Dated: September 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document has been furnished to Gerald S. Garnick, Esq., Garnick & Scudder, P.C., 32 Main Street, Hyannis, MA 02601, via first class mail on September 13, 2004.

A handwritten signature in black ink, appearing to be 'JS', is written over a horizontal line.

Jonathan Sablone

BOS1417128.1



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SEP 13 P 4:02
U.S. DISTRICT COURT
DISTRICT OF MASS.

September 13, 2004

Clerk's Office
U.S. District Court
District of Massachusetts
One Courthouse Way
Boston, MA 02210

RE: *Southwestern Bell Mobile Systems LLC v. Christopher P. Kuhn*
Civil Action No.: 04CV11584 PBS

Dear Madam/Sir:

Enclosed for filing in the above caption matter please find:

- (a) Plaintiff's Motion to Dismiss Defendant's Counterclaim Count III (Demand for an Accounting) and Count IV (Breach of Contract); and
- (b) Plaintiff's Memorandum of Law in Support of its Motion to Dismiss Defendant's Counterclaim Count III (Demand for an Accounting) and Count IV (Breach of Contract).

Thank you for your kind assistance in this regard.

Very truly yours,

Juán Alexander Concepcion